IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

FILED

January 26, 1998

Cecil W. Crowson
Appellate Court Clerk

ANNIE ATKINS,	)	
	)	
Plaintiff/Appellee	)	ROBERTSON CIRCUIT
	)	
v.	)	NO. 01S01-9706-CV-00138
	)	
YAMAKAWA MANUFACTURING CORPORATION OF AMERICA,	)	HON. JAMES E. WALTON, JUDGE
	)	
Defendant/Appellant	)	

For the Appellant:

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For the Appellee:

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M E M O R A N D U M O P I N I O N

Members of Panel:

Chief Justice Adolpho A. Birch, Jr.
Senior Judge John K. Byers
Special Judge Hamilton V. Gayden, Jr.

AFFIRMED

BYERS, Senior Judge

OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The plaintiff filed this suit and alleged she had developed bilateral carpal tunnel syndrome in the course and scope of her employment with the defendant. The trial judge found the plaintiff had sustained an anatomical impairment of ten percent to the right wrist and five percent to the left wrist for an average of seven and one half percent to each wrist.

The trial judge awarded the plaintiff permanent partial benefits based on a finding of 35 percent vocational disability to each arm, ordering part of the award to be paid in a lump sum. The trial judge also awarded the plaintiff the expense of obtaining the Standard Form Medical Report and deposition of her treating physician as well as the expenses of taking the depositions of two evaluating physicians.

The defendant says the plaintiff is not vocationally disabled and therefore not entitled to benefits and expenses.

We affirm the judgment of the trial court.

The plaintiff was age 40 at the time of trial. She is a divorced mother of five children who has a high school degree with no specialized job skills or training. Her work history consists almost entirely of unskilled, hand intensive labor. The plaintiff has worked for the defendant as a machine operator since early 1992. In this capacity, the plaintiff presses buttons of five different machines while continuously loading and unloading parts from the machines and placing completed component parts in a basket at her work station.

The evidence of whether the plaintiff has sustained a vocational disability is based upon the testimony of the plaintiff and the depositions of three doctors.

The plaintiff testified she began having pain in her hands as early as 1993. She saw a series of doctors about this pain. In May 1996, she selected Dr. Jack M. Miller, whom she saw for examination, treatment, and operation. The plaintiff underwent surgery first on her right hand and later on her left hand, but she testified that she continued to complain to Dr. Miller about the pain and numbness in her

hands even after the surgeries. The plaintiff also saw Dr. McInnis and Dr. Fishbein for evaluation purposes. The plaintiff further testified that she continues to have pain in her hands while working for the defendant and while doing her day-to-day activities at home.

Dr. Jack Miller was the plaintiff's treating physician who performed the carpal tunnel release surgeries. After each surgery, Dr. Miller restricted the plaintiff to light duty work for a few months, but he released her to regular work without any restrictions on October 23, 1996. On November 20, 1996, Dr. Miller examined the plaintiff and determined that she had good grip strength and no loss of sensation in her hands. Dr. Miller testified that the plaintiff did not have any permanent partial impairment and issued her a zero percent impairment rating based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Ed.*

Dr. John McInnis saw the plaintiff for evaluation purposes. He performed various tests and determined that the plaintiff had a satisfactory result from the surgeries. Dr. McInnis testified that the plaintiff had suffered a permanent injury and that she would retain a ten percent permanent partial impairment to her right arm and a five percent permanent partial impairment to her left arm based on the *AMA Guides*.

Dr. Richard Fishbein also saw the plaintiff for evaluation purposes. He performed the same tests that Dr. McInnis performed, and he relied upon the same information that Dr. McInnis relied upon in making his determinations. Dr. Fishbein testified that the plaintiff sustained a 15 percent permanent partial impairment to the right arm and a ten percent permanent partial impairment to the left arm.

After reviewing all of the medical and lay proof and concluding that the plaintiff had sustained an anatomical impairment of ten percent to the right wrist and five percent to the left wrist for an average of seven and one half percent to each wrist, the trial judge awarded the plaintiff permanent partial benefits based on a finding of 35 percent vocational disability to each arm.

The defendant first contends that the ultimate issue is not the extent of anatomical disability but the extent of vocational disability. Based on the medical opinion of Dr. Miller, who issued the plaintiff a zero percent impairment rating, the defendant argues that the plaintiff has no vocational disability.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 584 (Tenn. 1991).

In rendering his decision on vocational disability, the trial judge specifically noted that:

> "it's necessary that I look at all the medical proof and I realize that Dr. Miller is a treating physician, but I do believe that it's appropriate and required that the Court exam (sic) all the medical proof that's presented as it relates to any anatomical impairment. . . . I simply find that Dr. McInnis is in the middle, in his rating, between the two and I find his testimony to be extremely credible and competent and I place great weight in the testimony of Dr. McInnis."

The trial judge may, when there is a difference in opinion between the experts, accept the opinion of one expert over the opinions of the others. *Johnson v. Midwesco, Inc.,* 801 S.W.2d 804 (Tenn. 1990). However, where the medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA,* 884 S.W.2d 446 (Tenn. 1994).

The defendant further argues that Dr. Miller's opinion should be given more weight than the opinions of the two evaluating physicians because Dr. Miller was the plaintiff's treating physician. *Hughes v. MTD Products, Inc.,* No. 02S01-9602-CH-00019 (Tenn. Sept. 27, 1996); *Smith v. Bruce Hardwood Floors,* No. 02S01-9512-CH-00130 (Tenn. Aug. 30, 1996); *Nash v. Old Republic Ins. Co.,* No. 02S01-9512-CV-00123 (Tenn. May 17, 1996). In response to this argument, we point out that the rule is that the trial judge may give more weight to the treating physician's testimony, but he is not required to do so.

The trial judge further found that:

> "Not only must I look at the medical proof when there is dispute as there is here concerning the anatomical impairment, I also can and feel I have the duty to look at lay testimony when there is dispute in the medical proof. I find that the plaintiff is a credible and candid witness."

The testimony of the expert witnesses must be considered in conjunction with the employee and other lay witnesses. *Thomas v. Aetna Life Ins. Co.,* 812 S.W.2d 278 (Tenn. 1991). Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial

judge's determination. *See Humphrey v. David Witherspoon, Inc.,* 734 S.W.2d 315 (Tenn. 1987). When an issue hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence, other than the oral testimony of witnesses, that contradicts the trial court's findings. *Galbreath v. Harris,* 811 S.W.2d 88, 91 (Tenn. App. 1990), *cert. denied,* 502 U. S. 939 (1991).

Our review of the medical and lay evidence persuades us that the trial judge was correct in finding Dr. McInnis' testimony to be most compelling and in finding the plaintiff to be a credible witness. We find the evidence does not preponderate against the trial court's finding that the plaintiff is vocationally disabled.

Second, the defendant contends that the plaintiff is barred from recovering expenses related to taking Dr. Miller's deposition when she objected to the use of his Standard Form Medical ("SFM") Report and was also awarded the expenses for his SFM Report. On September 20, 1996, the plaintiff filed a notice to use the SFM Report by Dr. Miller, but she did not use it after Dr. Miller returned a blank SFM Report with only a "n/a" notation thereon but accepted the fee for completing it. Then on December 26, 1996, the defendant gave notice that it would use the SFM Report at trial. However, the plaintiff objected to the use of the SFM Report and deposed Dr. Miller.

Tenn. Code Ann. § 50-6-235(c) allows a party to admit expert medical evidence by way of a SFM Report. The statute also says that the other party can object to the use of a SFM Report and depose the doctor. The statute is silent on which party pays for the costs of taking the doctor's deposition upon objection to the SFM Report.

Given the fact that Dr. Miller accepted a fee to complete the SFM Report and returned it with only a "n/a" notation on it, the plaintiff's decision to object to defendant's use of the SFM Report and depose Dr. Miller was reasonable and necessary. Under these circumstances, the trial judge did not abuse his discretion in awarding these expenses to the plaintiff.

Third, the defendant contends that the plaintiff should not be allowed to recover a lump sum award to pay for expenses unrelated to her workers' compensation injury when those expenses could be paid for out of the lump sum

payment of accrued benefits and that the plaintiff has not proven the additional lump sum award is in her best interest and that she is able to wisely manage it. The trial court awarded the plaintiff a lump sum payment in the amount of $3,200.

The purpose of workers' compensation is to provide injured workers with periodic payments which are a substitute for regular wages. *Henson v. City of Lawrenceburg,* 851 S.W.2d 809 (Tenn. 1993). Periodic payment are manifestly in the best interest of most injured workers who require a substitute for the wages which they are no longer able to earn. Lump sum payments are considered an exception in carrying out the Workers' Compensation Act. When the plaintiff can demonstrate to the court that she can handle the lump sum payment wisely and that the payment is in her best interest, the court has upheld such payments as an exception to the general rule. Tenn. Code Ann. § 50-6-229(a); *Clayton v. Cookeville Energy, Inc.,* 824 S.W.2d 167 (Tenn. 1992); *North American Royalties v. Thrasher,* 817 S.W.2d 308 (Tenn. 1991).

The plaintiff testified that she is a divorced mother of five children and the primary source of their support. She further testified that she would use the partial lump sum payment to cover medical expenses for her children and to pay her car debt. The plaintiff stated that she would prefer to receive a lump sum payment so that she could pay her debts at one time.

The trial court has discretion to permit or refuse commutation of an award into a lump sum. The award of a lump sum payment must be affirmed on appeal unless this Court finds an abuse of discretion by the trial court. *Clayton v. Cookeville Energy, Inc.,* 824 S.W.2d 167 (Tenn. 1992). Based on the plaintiff's testimony, it was reasonable for the trial judge to find that she can handle the lump sum payment wisely and that the payment is in her best interest, and there was no abuse of discretion on his part. The lump sum award is therefore upheld.

Finally, the defendant contends that the plaintiff should not be allowed to recover expenses related to taking the depositions of two evaluating doctors selected by her in addition to the treating physician's deposition.

Tenn. Code Ann. § 50-6-226(c) addresses this issue. The statute says in pertinent part:

> "The fees charged to the claimant by the treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition

> relative to the claim, shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party."

In this case, the trial judge relied upon the depositions of the two evaluating physicians in making his decision on the plaintiff's vocational disability. Therefore, "the interests of justice" do not require that these expenses should be borne by the plaintiff. Furthermore, the trial judge's award for these expenses was strictly discretionary under Rule 54.04, Tenn. R. Civ. P. We find no error concerning the award of these discretionary costs. *See Miles v. Marshall C. Voss Health Care Ctr.,* 896 S.W.2d 773 (Tenn. 1995).

We affirm the judgment of the trial court.

_____
John K. Byers, Senior Judge

CONCUR:

_____
Adolpho A. Birch, Chief Justice

_____
Hamilton V. Gayden, Jr., Special Judge

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

ANNIE ATKINS,	}	*ROBERTSON CIRCUIT*
	}	*No. 7994 Below*
Plaintiff/Appellee	}	
	}	*Hon. James E. Walton,*
vs.	}	*Judge*
	}	
YAMAKAWA MANUFACTURING	}	
CORPORATION OF AMERICA,	}	*No. 01S01-9706-CV-00138*
	}	
Defendant/Appellant	}	*AFFIRMED*

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Defendant/Appellant and Surety, for which execution may issue if necessary.

IT IS SO ORDERED on January 26, 1998.

PER CURIAM